Do you recall that testimony?

A. Yes.

Q. Let me put in front of you a copy of Plaintiff's Exhibit 26, which is the Ruby Spears enterprises agreement.

Mr. Lincoln, did you read this agreement again last night?

A. I did.

Q. Now, Mr. Lincoln, my recollection yesterday is that you agreed with the suggestion of Mr. Fairhurst that this agreement contained a division of rights; is that correct?

A. I believe I testified to that.

Q. Would you please explain to the court what you mean or meant by that answer a division of rights under this agreement?

A. What I meant was we gave these people a license. We gave them the right to produce a television, cartoon series and a movie. We told them they had the ownership of the film but we retain everything else. That I recall negotiating. I said you are getting nothing else. We are keeping everything else. We are keeping the right to use any new characters that you create in arcade games or in any other way we wanted to.

We are keeping the right to use the characters or any part of the cartoon series in any way that we wanted.

And the agreement also says that we have to approve the scripts.

Q. When you say have to approve the scripts, you are compelled to approve the scripts or you have the right to?

A. We have the right to.

Q. Under the agreement, is Ruby Spears required to acknowledge in each of the cartoons that it is proceeding under Nintendo's copyright and trademark?

A. Yes, I believe it is.

Q. As a matter of fact, have you viewed these cartoons?

A. Yes.

Q. Do they contain an acknowledgement at the beginning of Nintendo's copyright and trademark rights?

A. Yes, I believe they do.

Q. In terms of merchandising or selling under license or licensing people to produce products based on the cartoon as developed by Ruby Spears, is Nintendo allowed to license anything that appears in the movie?

A. I think so.

Q. Including exact depictions of what appears in the cartoon movie?

A. Yes. There's a clause that simply says we reserve everything, that they don't -- what they got was

the right to make the cartoon series.

Q. Mr. Lincoln, yesterday both in direct and cross you testified that Nintendo earned approximately $2.3 million in royalities from product licensing; is that correct?

A. That's correct.

Q. As I recall your testimony you included in that Ralston Purina, and Milton Bradley?

A. Yes.

Q. The two of them together totaled approximately $1. of that 2.3 million?

A. Close to 2.6.

Q. Your testimony was from the balance of the product licenses, and you included Nintendo of Japan, from the royalities in the United States?

A. Yes.

Q. Earned approximately to 7 to 800,000 total?

A. Yes.

Q. You compared that to a figure of $19 million that Bally Midway obtained from product license for Pacman?

A. Yes, I did.

Q. You excluded in your testimony the revenues that Nintendo, the substantial revenues, that obtained from the home video and computer rights from Coleco and Atari; is that correct?

A. Our projections is around 40,000 of the Donkey Kong games.

Q. That's 40 of the 58,000 originally sold?

A. Yes.

Q. How do you account for the difference between 58 and 40?

A. Some of them I'm sure have been shipped to South America. Others we are selling a conversion kit where you -- and we are doing that right now -- where you take a Donkey Kong game -- we sell you a kit that turns you into a new Nintendo video game.

Q. Your testimony is about 40,000 Donkey Kong machine owners have not purchased that conversion kit?

A. That's correct.

Q. Mr. Lincoln, you use the term in response to a question from Mr. Fairhurst referring to a licensee as earning out their royalty. What does that mean?

A. It simply means that as they sell goods they pay a royalty, a percentage of the gross sales price of each unit. They earn out their royalty. That simply means that they ultimately sell enough of the units to equal the advance royalty that they have already paid when the license was entered into.

Q. Do I understand your testimony to be that your licensees had difficulty earning out their royalty?

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A. Yes.

Q. What did you mean when you said that?

A. They would produce -- let's take an example. Let's say Donkey Kong Socks. They would produce some Donkey Kong Socks. They didn't produce a warehouse full of Donkey Kong Socks. They produced Donkey Kong Socks. Then their sales people would go out and hit the major retailers and try to get orders. If they got the orders then the production of the units would start.

The problem with these licensees was they couldn't get a sell-in. They couldn't get those orders from the major retailers because of the existence of this lawsuit. Therefore, they didn't produce because they had no orders. We don't get a royalty on what they produce. We get a royalty on what they sell in and the problem that they were having, they were trying to enunciate, they were not getting any orders. No retailer would buy the stuff.

Q. Now, Mr. Lincoln, referring to the May 6th meeting again briefly, Mr. Fairhurst asked you several questions about the Cooper agreement referred to in the telex and you and he engaged in a little back and forth and you indicated that you didn't specifically ask for the Cooper agreement at the May 6th meeting.

And I want to ask you was there any reason why you didn't ask for the Cooper agreement.

Plaintiff's Exhibit 53.

That's it?

A. I remember. That's the one that came in, yes.

MR. FAIRHURST: Thank you, Mr. Lincoln.

THE WITNESS: Thank you, Mr. Fairhurst.

REDIRECT EXAMINATION

BY MR. KIRBY:

Q. Mr. Lincoln, did you ever advise Atari orally and otherwise that Nintendo considered its agreement with Universal to be a breach of the Nintendo agreement?

A. Yes.

Q. Who did you advise?

A. Jamie Cook.

Q. Who is Jamie Cook?

A. He's a vice-president and an attorney for Atari. It was Mr. Cook and Mr. Paul who had negotiated the license agreement. So I was familiar with Jamie as well as Mr. Paul.

Q. When did you so advise them?

A. It was in March of 1983.

Q. I recall your testimony was that it was March of 1983 you learned from discovery in this action that Atari had entered into an agreement with Universal?

A. That's correct.

Q. What transpired when you advised them you

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considered them in breach?

A. After we had learned in the discovery that Atari had signed an agreement I asked our Seattle attorney Lynn Hvalsoe. I asked Lynn Hvalsoe to get in touch with Skip Paul and I said I wanted her to get a copy of the agreement. I wanted to see the agreement or I wanted to find out what was going on and I was on vacation at the time and she called me in Bend, Oregon and said that Skip has not been cooperative and was giving her a bad time. So I immediately phoned Jamie and I told him that I was upset and that I wanted to see a copy of that agreement and that we considered what they had done to be outrageous and a breach, particularly in view of the fact that I had breakfast with Skip in Toy Fair in February of 1983 and he told Mr. Arakawa and myself that they hadn't. I think by then I found out that they had signed an agreement before.

I was very upset and I told him in no uncertain terms that we were very angry about this and we considered it a breach and that's the sum and substance of it.

Q. Mr. Lincoln, you testified in response to a question on cross that sometime at the end of July of 1982 Nintendo entered into an agreement with Coleco subsequent to the license for the Coleco tabletop and Coleco home cartridge game for figurines?

A. Yes.

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Q. Would you describe what that contract was?

A. This is just one of our standard form license agreements. It's really a Nintendo of America agreement with Coleco for these mechanical and nonmechanical figures. They are little figures about two inches high of the Donkey Kong characters. We did enter into that agreement.

Q. Had that been in negotiation prior to July of 1982?

A. I believe it had.

Q. Since June 29, 1982, Mr. Lincoln, had Coleco sought license agreements from Nintendo for other Nintendo video arcade games?

A. Yes, they have.

Q. Which ones?

A. Popeye, Mario Brothers and Donkey Kong 3.

Q. Were licenses issued to Coleco for the home video rights or the tabletop rights for any of those three games?

A. No.

Q. In any instance was Coleco the highest or a competitive bidder for those rights?

A. Oh, yes.

Q. What was Coleco told about its failure to receive licenses for those products which it had sold?

A. Oh, I nad conversation at some point in time

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with Al Kahn, who is the executive vice president of marketing for Coleco and he just looked at me and said, you know, I'm getting the impression that we are not getting any more -- we don't seem to be successful in any of these home video licenses. He said, I am also getting the impression that that's probably because Mr. Yamauchi is upset that we signed this agreement with Universal. I said, Al, that's a correct impression.

Q. You also testified on cross-examination that Mr. Yamauchi spoke with Coleco about the Universal agreement; is that correct?

A. Yes, sir.

Q. Would you tell the court about that conversation?

MR. FAIRHURST: I have to object.

THE COURT: Overruled.

A. That occurred in June of 1983 at the consumer electronics show in Chicago. Mr. Yamauchi came over from Japan and when he arrived he instructed me, through Mr. Arakawa, to arrange a meeting, set up a meeting, with Mr. Greenberg, Arnold Greenberg, the chief executive officer of Coleco, Mr. Bromley, Mr. Al Kahn. I think there was one other. Can, Bromley and Greenberg, those three in our hotel suite. I called Arnold. We set up the meeting. The meeting occurred in the evening hours in our suite. Mr. Yamauchi started the meeting by telling Mr. Greenberg that

he was outraged by what Coleco had done, that he considered it's disloyal, offensive.

Mr. Greenberg responded that he was sorry, that he knew that what Coleco had done had terribly damaged the relationship between Coleco and Nintendo and that he would never do anything like that again and he asked Mr. Yamauchi to accept his apologies.

Q. Mr. Lincoln, you testified that you drafted what is in evidence as plaintiff's 12 and 12 A, the Nintendo/Coleco agreements and you also testified that there is no indemnification clause in those agreements?

A. That's correct.

Q. Will you describe the process by which these agreements were drafted without an indemnification clause?

MR. FAIRHURST: I have to object.

THE COURT: Overruled.

A. Mr. Arakawa came to my office and asked me to draft these agreements, agreements like this. He gave me the basic terms of the agreement, the royalty rate, et cetera.

He also gave me a draft that had been prepared by Nintendo Company Ltd. I took that. I didn't think that that was very good. I revised it. I worked on it for a long period of time and finalized the agreement on Christmas Eve of 1982.

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